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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

JUL 22 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)	GC Docket No. 92-52
)	
Reexamination of the Policy)	RM-7739
Statement on Comparative)	RM-7740
Broadcast Hearings)	
To: The Commission		

COMMENTS OF TAK COMMUNICATIONS, INC.

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July 22, 1994

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SUMMARY

Tak Communications, Inc., debtor-in-possession ("Tak"), addresses the FCC's comparative criteria and related factors insofar as they apply to comparative and related factors insofar as they apply to comparative license renewal proceedings. In the original Notice of Proposed Rulemaking in this docket, the FCC acknowledged that distinct issues pertinent to comparative renewal proceedings are the subject of an unresolved rulemaking proceeding, but that the comparative criteria adopted for new broadcast facilities could be applied to comparative license renewal proceedings where the renewal expectancy factor was not dispositive. 7 FCC Rcd 2664, 2671 n.1 (1992). Tak accordingly believes that its Comments are appropriate for consideration in this docket. To the extent these Comments may be deemed more suitable for consideration in the unresolved Comparative Renewal proceeding,^{1/} Tak urges the FCC to reactivate that proceeding with these Comments in mind.

Tak presents the following recommendations:

1. The FCC should adopt, and apply to pending competing applications, meaningful acceptability criteria similar to the criteria for competing cellular applications set forth in Sections 22.917(g) and 22.940 of the Commission's Rules.

Formulation of Rules and Policies Relating to Broadcast Renewal Applicants, 3 FCC Rcd 5179 (1988); 4 FCC Rcd 4780 (1989), recon. denied, 5 FCC Rcd 3902 (1990).

2. The FCC should make it clear that the renewal expectancy preference is available to broadcast license renewal applicants undergoing a Chapter 11 reorganization.

3. The new comparative criteria for license renewal proceedings in which the renewal expectancy preference is not dispositive should be based on verifiable structural factors (such as minority ownership and comparative coverage) that provide cognizable public interest benefits.

4. In order to settle a number of difficult and protracted cases presently subject to a "freeze" and as to which the underlying criteria are not known and will be subject to court challenge for years to come, the FCC should open a brief "window" in which comparative renewal cases could be settled based on waivers of Section 73.3523 and/or the FCC's current "white knight" policy.

5. The FCC should consider adopting a two-step renewal procedure for broadcast applicants similar to that adopted for cellular applicants.

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To: The Commission

COMMENTS OF TAK COMMUNICATIONS, INC.

Tak Communications, Inc., debtor-in-possession ("Tak"), by its attorneys and pursuant to Section 1.415 of the FCC's Rules, hereby submits its Comments in response to the Second Further Notice of Proposed Rulemaking, FCC 94-167 (released June 22, 1994) ("Second Notice").

A. Introduction.

Tak is a multiple-station owner which is operating its stations as a debtor-in-possession during the reorganization of the company under Chapter 11, Title 11, of the United States Bankruptcy Code.^{2/} Tak's license renewal

^{2/} Tak's stations are: WGRZ-TV, Buffalo, New York; WKOW-TV, Madison, WAOW-TV, Wausau, WXOW-TV, La Crosse and WQOW-TV, Eau Claire, all in Wisconsin; KITV(TV), Honolulu, KHVO(TV), Hilo and KMAU(TV), Wailuku, all in Hawaii; WUSL(FM), Philadelphia, Pennsylvania; WTPX(FM), Ft. Lauderdale, Florida; and WKIO(FM), Urbana, Illinois.

applications for its Buffalo, New York and Wisconsin television stations are the subject of competing applications that have not been designated for hearing.^{3/}

In these Comments Tak will address the FCC's comparative criteria insofar as they may apply to comparative license renewal proceedings. In the original Notice of Proposed Rulemaking ("Notice") in this docket, the Commission acknowledged that distinct issues pertinent to comparative renewal proceedings were the subject of an unresolved inquiry in another docket,^{4/} but that the comparative criteria adopted for new broadcast facilities could be applied to comparative license renewal proceedings where the renewal expectancy factor was not dispositive. Notice, 7 FCC Rcd 2664, 2671 n.1 (1992). Tak accordingly believes that its Comments are appropriate for consideration in this proceeding. To the extent Tak's Comments may be deemed more suitable for consideration in the unresolved Comparative Renewal proceeding, Tak urges the Commission to reactivate that proceeding with these Comments in mind. Such action is particularly appropriate and timely in light of the Commission's recent thorough

3/ The competing applications filed against Tak's four Wisconsin television license renewal applications were filed on November 3, 1992 by Shockley Communications Corporation. See BPCT-921103KE-KH. The competing application filed against Tak's Buffalo television license renewal application was filed on April 29, 1994 by Buffalo Broadcasting Corporation. See BPCT-940429KF.

4/ Formulation of Rules and Policies Relating to Broadcast Renewal Applicants, 3 FCC Rcd 5179 (1988); 4 FCC Rcd 4780 (1989), recon. denied, 5 FCC Rcd 3902 (1990) ("Comparative Renewal").

examination of comparative license renewal procedures and policies for cellular radio licensees.^{5/}

Tak makes the following recommendations in these Comments:

- The FCC should adopt more stringent criteria for acceptable competing applications, similar to those adopted in the Cellular Renewal proceeding.
- The FCC's renewal expectancy preference should be available to companies undergoing a Chapter 11 reorganization.
- The FCC's comparative criteria should be based on verifiable structural factors such as minority ownership and comparative coverage, rather than illusory predictive factors that are not enforced by the FCC or other factors not shown to have discernible public interest benefits.
- During its deliberation as to appropriate comparative standards, the FCC should open a brief "window" during which the current restrictions on settlement payments and "white knight" settlements would be waived.
- The FCC should consider adopting a bifurcated hearing procedure for competing broadcast applications, similar to the procedure adopted in the Cellular Renewal proceeding.

^{5/} See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 7 FCC Rcd 719 (1992), reconsidered in part, 8 FCC Rcd 2834, recon. denied, 8 FCC Rcd 6288 (1993), reconsidered further, FCC 94-164 (released July 7, 1994) ("Cellular Renewal").

B. Argument.

1. More Stringent Criteria for Acceptance of Competing Applications Are Needed.

The FCC could reduce the number of abusive competing applications that are filed by adopting stringent standards for acceptance of competing applications. The FCC presently accepts applications filed with self-certification of financial ability and site availability, based on flimsy, meaningless "Swiss cheese" financing letters and "reasonable assurance" site letters (or conversations) which do not even need to be filed as part of the application. These lax standards have led to the filing of applications which should never be accepted, but instead move through the processing line and into years of litigation based on the challenger's hope that the incumbent will somehow be wounded or bled dry in litigation, prompting a pay-off (notwithstanding Section 73.3523) to the challenger. Adopting meaningful acceptability standards for competing applications, and applying those standards to existing applications (following an opportunity for amendments), would be an important step toward eliminating abusive applications.

The FCC recognized the need for such meaningful standards in the Cellular Renewal proceeding. In that proceeding the FCC adopted Section 22.917(g) of its rules, requiring a challenger to demonstrate in its application that, inter alia, it has a firm financial commitment, an irrevocable letter of credit or a performance bond from a recognized financial institution or equipment supplier,

or sufficient internal resources, for its realistic budgeted costs of construction and first year of operation. The FCC also adopted Section 22.940, requiring that the challenger submit as part of its application written confirmation from the site owner of the availability of the applicant's proposed antenna-transmitter site(s) for the proposed use.

Parallel rules are clearly required for competing broadcast applicants. Both the Commission and incumbent licensees have been burdened in too many instances by challengers who mount protracted legal battles even though they lack the bare requisites of an available site and/or available funds to build their proposed stations. See, e.g., Metroplex Communications, Inc., 4 FCC Rcd 8149, 8160-61 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 5610 (1990) rev'd and remanded sub nom. Charisma Broadcasting Corp. v. FCC, No. 93-1188, 1994 WL 69521 (D.C. Cir. Feb. 15, 1994) (five years of litigation by challenger that lacked "reasonable assurance" of financing). The FCC should adopt the same acceptability standards for competing broadcast applications as for competing cellular applications. In addition, those criteria should be applied to existing applicants, following an opportunity to amend their applications to meet the new standards. Any application that did not meet the standards would be dismissed, rather than designated for hearing. Taking these simple and long overdue steps would largely curtail the filing and prosecution of abusive applications. As with the settlement "window" suggested below, these changes could be made now, prior to adoption of new substantive criteria.

**2. The Renewal Expectancy Preference
Should Be Available to Companies
Undergoing a Chapter 11 Reorganization.**

As stated above, Tak is presently involved in comparative license renewal proceedings involving its Buffalo, New York television station (WGRZ-TV) and its Wisconsin television stations (WKOW-TV, WAOW-TV, WXOW-TV and WQOW-TV). Tak believes the competing applications were filed not as a result of any shortcomings in Tak's record as a public trustee, but merely because the company is undergoing a Chapter 11 reorganization. The theory underlying the competing applications appears to be that a debtor-in-possession in the process of reorganization under Chapter 11 has no claim to a renewal expectancy or will lose its claim as a result of a reorganization under Chapter 11.

Attached as Exhibit 1 is a copy of Tak's "Consolidated Petition for Expedited Action on Petition to Dismiss, or, in the Alternative, for Prompt Designation for Hearing and Related Relief" filed in the Wisconsin license renewal proceeding. That petition addresses the renewal expectancy issue and demonstrates that the FCC's case law and the Bankruptcy Code require that Tak (as well as any similarly situated companies) be entitled to establish a renewal expectancy notwithstanding any Chapter 11 reorganization.^{6/} Tak will not repeat

^{6/} The confirmed plan of reorganization referenced in the Petition was not consummated due to inability to obtain FCC approval within the plan's time frame and is deemed withdrawn. Tak nevertheless requests a ruling on this issue for purposes of any subsequent plan of reorganization approved by the Bankruptcy Court, and for purposes of resolving this issue before other companies confront it.

the substance of that pleading here, but it urges the FCC to address this issue so as to reconcile the FCC's policies with the purposes and requirements of the Bankruptcy Code. Absent such action, innocent creditors may face costly and unnecessary delays in addition to the delays and expenses inherent in any Chapter 11 proceeding.

3. The FCC's Comparative Criteria Should Be Based on Verifiable Structural Factors.

The FCC's Second Notice strongly suggests a desire on the part of the FCC to adopt a minimal, incremental set of changes in its substantive criteria in response to the court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Tak urges the FCC to resist this understandable impulse. The Bechtel decision presents the FCC with the opportunity to rewrite its standards to reflect reality. Such an opportunity should not be squandered due to a reflexive desire to preserve the status quo, particularly when the status quo does not provide any discernible public interest benefits.

If a licensee's past service warrants a renewal expectancy, that determination should be dispositive. In the renewal proceedings where a renewal expectancy is not warranted, Tak submits that the FCC should be guided by the following principles:

Integration Cannot Be Revived. The FCC tried twice and utterly failed twice to justify its integration criterion in the Bechtel case. The entire integration structure, with its various substructures, must be abandoned.

Verifiable Structural Factors Should Be Used. The most serious shortcoming of the integration factor was that it was based on predictions of future actions, without any accompanying enforcement mechanism. The FCC instead should look to verifiable structural factors that provide cognizable public interest benefits.^{7/} Tak believes that such factors would include minority ownership first and foremost. Minority ownership has been recognized by Congress and the FCC as providing important public interest benefits and was approved by the Supreme Court as a comparative factor that advances important governmental interests. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3009-10 (1990).^{8/} Comparative coverage is another clearly verifiable factor that provides cognizable public interest benefits and a valid basis for distinguishing among competing applicants.^{9/}

7/ Tak recommends that the Anax doctrine discussed in the Notice (7 FCC Rcd at 2672 n.10) be eliminated so as to prevent the type of questionable structuring discussed therein and in the Metroplex decision, supra. This would also provide clearer differences between competing applicants.

8/ The FCC's former preference for female ownership, on the other hand, was invalidated by the D.C. Circuit in Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

9/ In the past, this factor was somewhat questionable because there was no enforcement mechanism to ensure that an applicant built its station as proposed. Tak recommends that a challenger be required to make the initial showing of site availability described above and then forfeit the authorization if it received a dispositive coverage preference but cannot build at the proposed site or a site that provides equivalent coverage benefits.

Tak also recommends that the FCC give more credit for service to areas with five or more existing signals. In today's environment, the viewing and listening public expects a multitude of signals and benefits from each additional choice provided by new over-the-

(continued...)

On the other hand, the FCC should discard comparative factors that do not provide clear public interest benefits. Local ownership, as indicated in Bechtel I^{10/}, is a highly questionable factor given the prevalence of local professional managers in the broadcast industry. Likewise, involvement of station owners in local civic activities does not necessarily provide public interest benefits, given the likelihood that a station's professional managers similarly will be involved in local civic activities.

The Diversification Factor Should Be Reexamined in Light of Contemporary Reality. If diversification of ownership of media outlets does provide public interest benefits, this is only the case in local markets. Ownership of regional or distant media outlets has no bearing on competition in the broadcast industry, which occurs solely in local markets. Ownership of another local media outlet does appear to be a valid basis for a comparative demerit, but, in light of the multitude of media outlets that exist in this country, ownership of regional or distant media outlets does not involve any meaningful detriment to the public interest and should not be the basis for a comparative demerit.^{11/}

9/ (...continued)
air broadcast signals.

10/ Bechtel v. FCC, 957 F.2d 873, 879 (D.C. Cir. 1992).

11/ For the same reasons stated above in Note 7, the Anax doctrine should not apply to assessments of the diversification factor.

4. The Restrictions on Settlement Payments and "White Knight" Settlements Should Be Waived for a Brief Period During Consideration of New Substantive Standards.

The FCC in 1989 adopted restrictions on payment of consideration for the withdrawal of applications filed in competition with broadcast license renewal applications. See Comparative Renewal, 4 FCC Rcd 4780 (1989), recon. denied, 5 FCC Rcd 3902 (1990). The limits prohibit all payments for the withdrawal of a competing application prior to the Initial Decision stage and limit payments thereafter to reimbursement of legitimate and prudent expenses. See Section 73.3523 of the FCC's Rules. These restrictions were adopted to prevent abuse of the Commission's processes. Comparative Renewal, 4 FCC Rcd at 4782. A separate policy, adopted for similar reasons, prohibits certain "white knight" settlements in which a non-applicant merges with or acquires one of the applicants and pays other parties to withdraw their applications.^{12/}

At present, the comparative hearing process is "frozen" while the FCC considers new substantive criteria. See Public Notice, FCC 94-41 (released February 25, 1994). Because the future criteria are unknown and applicants are not incurring litigation expenses, there is little incentive to settle pending cases. However, Tak believes there are important public interest benefits to be gained from settlements. In the comparative renewal context, settlements can remove uncertainty over a station's future, enabling a licensee to engage in long-term

^{12/} See Rebecca Radio of Marco, 5 FCC Rcd 937, recon. denied, 5 FCC Rcd 2913 (1990).

planning and assisting the licensee in operating with greater stability. Settlements also conserve the resources of the FCC and the competing applicants. Moreover, in Tak's case settlements would remove a potential hurdle to adoption of a plan of reorganization that would compensate innocent creditors and allow the company to emerge from its pending Chapter 11 proceeding.

Because settlements of pending cases would provide public interest benefits but are either discouraged or not allowed under the status quo, Tak urges the Commission to open a brief "window" in which comparative renewal proceedings could be settled based on waivers of Section 73.3523 and/or the current "white knight" policy. Because any competing applications affected by such a window either were filed under the current rules or have been prosecuted for at least five years, the FCC should presume, subject to the possibility of a showing to the contrary in any particular case, that those applications were not filed for purposes of extracting a "greenmail" payment.

Adopting this proposal would provide a clear opportunity and incentive to settle a number of difficult and protracted cases which are presently "frozen" and as to which the underlying criteria are not known and will be subject to court challenge over a period of years. Such a one-time waiver of current policy, adopted under these unique circumstances, would not encourage the filing of abusive applications, particularly if the reform proposals discussed in the preceding sections are adopted.

5. **The FCC Should Consider Adopting a Bifurcated Renewal Procedure for Broadcast Applicants Similar to That Adopted for Cellular Applicants.**

In the Cellular Renewal proceeding, the FCC adopted a two-step renewal hearing procedure. Under this procedure, if a licensee demonstrates in a threshold paper hearing that it is entitled to a renewal expectancy based on specific performance criteria applied to the past license term, competing applicants will not be considered eligible for the license in question.

The FCC recognized that a similar procedure for broadcast renewal applications had been invalidated in 1971 by the U.S. Court of Appeals for the D.C. Circuit. See Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972). However, the FCC concluded that the holding in Citizens could be distinguished from the cellular context or, alternatively, the court could be persuaded to overturn Citizens because it no longer represents the court's current thinking in this area, in light of Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989), and other decisions.

Tak concurs with the view that Citizens no longer reflects the prevailing law on the issue of criteria for acceptance of competing applications. Tak recognizes that the FCC stated that its decision in the Cellular Renewal proceeding leaves open the question of whether a similar bifurcated procedure in

the broadcast context would be adopted. 8 FCC Rcd at 6288. Tak urges the FCC to consider that question now.

C. Conclusion.

The FCC should adopt acceptability criteria for competing applications similar to the criteria adopted in the Cellular Renewal proceeding. This long overdue step could also be taken while the comparative criteria are being considered. Not only would this action eliminate most abusive applications, it would simplify the use of new comparative criteria by reducing the number of competing applicants.

Tak urges the FCC to rule that the renewal expectancy preference is available to companies undergoing a Chapter 11 reorganization. Tak also urges the Commission to base its comparative criteria on verifiable structural factors in license renewal proceedings where a renewal expectancy is not warranted. Minority ownership, comparative coverage and diversification in local media markets appear to be three factors on which such decisions could be based. If combined with the new acceptability standards described above, the number of applicants should be reduced and the comparative selection process could be done through a paper hearing, without any need for discovery or oral testimony. Such reforms would also bring the FCC's decisional process closer to the reality of broadcasting in the 1990's.

Prior to the adoption of new comparative criteria, the FCC should open a "settlement window" during which it will waive Section 73.3523 of the

Rules and its "white knight" policy. Such a one-time window would provide public interest benefits by allowing the settlement of a number of cases that otherwise could entail lengthy and costly litigation under presently unknown criteria.

Finally, The FCC should consider adopting a bifurcated license renewal procedure patterned after the procedure adopted in the Cellular Renewal proceeding.

Respectfully submitted,

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July 22, 1994
Washington, D.C.

EXHIBIT 1

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Applications of
Tak Communications, Inc.,
Debtor in Possession

For Renewal of Licenses of

WXOW-TV, LaCrosse, Wisconsin
WAOW-TV, Wausau, Wisconsin
WQOW-TV, Eau Claire, Wisconsin
WKOW-TV, Madison, Wisconsin

File Nos. BRCT-920731KP
BRCT-920731KY
BRCT-920731LA
BRCT-920731LB

To: Chief, Mass Media Bureau

CONSOLIDATED PETITION FOR EXPEDITED ACTION
ON PETITION TO DISMISS OR,
IN THE ALTERNATIVE,
FOR PROMPT REORGANIZATION FOR HEARING
AND RELATED RELIEF

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March 23, 1993

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